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No. 216

In the Supreme Court of the United States

OCTOBER TERM, 1968

PATRICK G. MARTONE,

Appellant,

v.

CECIL MORGAN, WILLIAM REDMANN, ANDREW P. TUGWELL, J. B. LANCASTER, AND JOHN JULIAN MCKEITHEN,

Appellees.

On Appeal from the Supreme Court of the State of Louisiana

APPELLEES' REPLY TO PETITION FOR REHEARING

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May it Please the Court:

I.

ONLY ISSUE BEFORE COURT IS CONSTITUTIONALITY VEL NON OF STATUTE

The main thrust of the petition for rehearing is that "events occurring since the inception of this lawsuit in relation to the administration of said state statute give rise to profound questions of constitutional law." None of those events are in the record in this cause. Furthermore, this cause was tried in the Nineteenth Judicial District Court of Louisiana for the Parish of East Baton Rouge solely on the original

petition. The trial was on a rule to show cause why a preliminary injunction should not issue enjoining the Labor-Management Commission of Inquiry, sued as a body politic, from "conducting any investigation or hearing of any type" etc. At the trial of the rule both petitioner and defendants were afforded the opportunity to offer evidence in proof of or in contradiction of the allegations of the petition. (La. Code of Civil Procedure Article 3602). *No evidence was offered by petitioner or defendants on the trial.* An answer to the rule by defendants was not required by Louisiana law, (id., Art. 2593), and none was filed; the cause was put at issue by defendants appearing, and accordingly, all allegations of the petition were considered as denied. Under Louisiana law, as elsewhere, the petitioner was required to prove the allegations of fact in the petition for the rule by evidence as in ordinary cases. (id., Art. 3609). *But, there was no evidence offered by either petitioner or defendants on the trial of the rule.* Additionally, the events alleged in the application for rehearing had not even occurred at the time of the trial below. The only evidence before the court was the statute, as the district court was required by law to take judicial notice of it. (id., 1391) Judgment was rendered on January 5, 1968 by the district court, after trial of the rule, with much argument of counsel, but no evidence, decreeing the statute unconstitutional. This judgment was signed January 9, 1968, and a suspensive appeal therefrom was taken by defendants to the Supreme Court of Louisiana a few minutes later. Later on during the

same day, but after the appeal, the petitioner filed a supplemental petition, the allegations of which were not before the court at the hearing of the rule. The appeal was from the said judgment granting the preliminary injunction.

The allegations in the petition for a rehearing were all matters which occurred after the judgment was rendered by the district court on January 5, 1968 and after an appeal therefrom was perfected to the Supreme Court of Louisiana on January 9, 1969. These allegations are not in the record, and appear in this cause for the first time in this application for a rehearing. The following is a summary of the allegations in the petition for rehearing, all being outside of the record, viz: the allegations of events on January 17, 1968 in Iberville Parish (Petition for Rehearing, page 3); the allegation of the Governor's press conference on January 19, 1968 (id., p. 3); the allegations of criminal charges filed against one Rodney Jenkins on February 15, 1968 (id., p. 4); the allegation concerning one Jerry Sylvester and bail bonds on September 3 and 23, 1968 (id., p. 5); the denial of supervisory writs of Stanley H. Jackson by the Supreme Court of Louisiana (id., p. 6); the change of venue in State v. Jackson on September 30, 1968 (id., p. 7); allegations of events in October, 1968 by Jackson in suit against Gremillion, (id., p. 8); and information filed against one George Wyatt on October 9, 1968 (id., p. 8). None of these allegations are properly before this Court. Hedgeworth v. North Carolina, 334 U.S. 806, 92 L. Ed. 1739, 68 S. Ct. 1185.

Thus, it is clear that the only issue heard and decided by the judgment of the district court was the issue of the constitutionality of the statute on its face. There can be no claim by petitioner that there is any issue now before the Court "in relation to the administration of the statute", as there was no evidence offered in support of any allegations thereof, and the "events occurring since the inception of this lawsuit", all took place after the trial and judgment below, and are not in the record.

On the appeal to the Supreme Court of Louisiana, which was heard on January 18, 1968, the judgment of the district court was reversed, and the statute was ruled constitutional, by opinion handed down on February 19, 1969. Martone v. Morgan, 251 La. 993, 207 So. 2d 770. The present appeal is from that judgment, and only presents the constitutionality vel non of the statute. The Supreme Court of Louisiana only passed on the validity vel non of the statute, as there was no evidence offered on the trial in support of any other claim.

II.

CONSTITUTIONALITY VEL NON OF STATUTE

In approaching the question of the constitutionality of the statute, in the absence of any facts or evidence, there is a presumption that the officials will not misuse the authority vested in them by the statute. We quote from Re Groban, 352 U.S. 330 (334), 1 L. Ed 2d 376 (381), 77 S. Ct. 510, viz:

> "We think, however, that the presumption of fair and orderly conduct by state officials without coercion or distortion exists until challenged by facts to the contrary. Possibility of improper exercise of opportunity to examine is not in our judgment a sound reason to set aside a State's procedure for fire prevention. As in similar situations, abuses may be corrected as they arise, for example, by excluding from subsequent prosecutions evidence improperly obtained."

In order to determine the constitutionality of the statute, under the Fourteenth Amendment's requirement of due process, we must first look to the nature of the investigation proceeding it authorized, and second, determine whether there was a weighty public interest involved in the investigation which was authorized by the statute. Hannah v. Larche, 363 U.S. 420 (442), 4 L. Ed 2d 1307 (1321), 80 S. Ct. 1502. In Hannah, the constitutionality of the procedures in the investigation and report of the Civil Rights Commission was involved. The present statute was modeled after the statute creating the Civil Rights Commission. (42 USCA 1975, etc.) In Hannah, this Court said, viz:

> " 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for

example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The *nature of the alleged right involved*, the *nature of the proceeding*, and the *possible burden on that proceeding*, are all considerations which must be taken into account." (Emphasis supplied)

The Labor-Management Commission was prohibited by the statute from making binding adjudications, and the statute said "it shall be investigatory and fact finding only." This has to do with the nature of the right involved, that is, it could investigate, and could not adjudicate.

It was common knowledge at the time this statute (Act No. 2 of the 1967 Extra Session of the Louisiana Legislature; La. R.S. 23:880.1 through 880.18) was enacted in July, 1967, that the area along the Mississippi River in the vicinity of Baton Rouge was then the fastest growing petro-chemical complex in the United States. This area included the Parishes of East and West Baton Rouge, Ascension, Iberville and St. James. It was also common knowledge that at such time (July, 1967) there were many multi-million dollar petro-chemical plants under construction in that area.

The preamble of the statute commenced with the declaration, viz:

> "Whereas, unprecedented conditions presently exist in the state under which there has been a shut-down of construction work involving industrial development projects giving employment to thousands of persons and vitally affecting the public interest and threatening the orderly conduct of normal labor-management relations;"

Thus, in accordance with this finding by the Legislature, there were incidents damaging to the economy of the State which were taking place. Surely, some governmental action was required in face of such a finding. The Government of Louisiana was required to investigate and find out what these "unprecedented conditions" were, which were so damaging to the economy of the State. Congress enacted the Civil Rights Commission to investigate allegations that certain citizens were being deprived of their vote, which would be a criminal offense. Hannah v. Larche held that statute constitutional. Louisiana was faced with a situation which required investigation not only similar to the investigation by the Civil Rights Commission, but also similar to the investigation of the Fire Marshal of the cause of a fire as was before this Court in Groban. As was stated in the concurring opinion by Mr. Justice Frankfurter, in which Mr. Justice Harlan joined, in Groban,

> "This is not a statute directed to the examination of suspects. It is a statute authorizing inquiry by the chief guardian of a community against the hazards of fire into the causes of fires. To be sure,

> it does not preclude the possibility that a suspect might turn up among those to be questioned by the Fire Marshal. But the aim of the statute is the expeditious and expert ascertainment of the causes of fire."

Thus, there was a high governmental purpose to be served to ascertain the facts in connection with the "unprecedented conditions" which were damaging the economy, in order that some, or all of the branches of government, Executive, Judicial or Legislative, might act to alleviate further damage to the economy of the State. This was the nature of the proceeding, that is, a high public interest was to be served.

The next declaration of the Legislature, as set forth in the preamble of the statute, was, viz:

> "Whereas, in connection with the conditions referred to there have been allegations and accusations of violations of the state and federal criminal laws which should be thoroughly investigated in the public interest;"

A fair inference from this finding of the Legislature is that those charged with the investigation of allegations and accusations of violations of criminal laws were not doing that which it was their duty to do, and that the situation was such that some new investigatory body was needed to get the facts. A reasonable inference from this also is that the Legislature felt that perhaps some of those charged under the then existing law with investigation and prosecution might be involved in the "allegations and accusations of violations" of criminal laws in the labor-management area.

For surely, the Legislature knew that the Sheriff of each parish in Louisiana was charged with the duty to investigate "allegations and accusations of violation" of criminal laws of the State. (La. Code of Criminal Procedure, Art. 131). And surely the Legislature knew that the entire responsibility of every criminal prosecution was on the district attorney in each parish, subject only to an extremely circumscribed right of supervision by the Attorney General of the State (id., Art. 61; Kemp v. Stanley, 204 La. 110, 15 So. 2d 1). And surely the Legislature knew that although a grand jury in Louisiana "may" inquire into offenses (La. Code of Criminal Procedure Art. 437), nevertheless, the district attorney is the legal advisor of the grand jury, and its actions are greatly circumscribed without his leadership. (State v. Platt, 193 La. 928, 192 So. 659). Surely, also, the Legislature knew that the State Police were charged with the duty to detect crime and enforce the criminal laws (La. R.S. 40:1379), subject to certain limitations (id., 40:1386 and 1387).

The findings of the Legislature in the preamble of the statute thus clearly infer that the Legislature was concerned about law enforcement in the area of crime in labor-management relations, and was concerned that perhaps some of those charged with law enforcement were not only not doing that which they were charged under the law to do, but perhaps some of those charged with enforcing the law might be involved in the allegations of violations of criminal law in the labor-management area.

The judgment rendered by the district court was

rendered after a trial where the petitioner was given the opportunity to offer evidence, but did not do so. Therefore, the allegations of the petition are considered as *not proven*, as there was no evidence offered to support them. Thus, the only question before the court on this appeal from that judgment is the constitutionality vel non of the statute.

As was observed in Groban,

> "Prosecution of an individual differs widely from an administrative investigation of incidents damaging to the economy or dangerous to the public."

The investigation in Hannah was held not to be a criminal trial, nor an adjudication of rights by an administrative proceeding, just as the investigation by the fire marshal in Groban was held not to be a criminal trial, nor an administrative proceeding that would in any way adjudicate, but were proceedings solely to elicit facts relating to persons being unlawfully deprived of their right to vote in Hannah, and to the causes and circumstances of the fire, in Groban. That is the situation with reference to the present statute, as it does not adjudicate, but only elicits facts. As was stated in Hannah, viz:

> "xxx when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used."

Though there is no evidence in the record in support thereof, nevertheless, there are inferences that can be made from the finding of fact in the preamble

of the statute, which says that "allegations and accusations of violations" of criminal laws should be investigated. It can be inferred that the Legislature knew that the sheriffs, state police, district attorneys and grand juries were charged with the duty under the law to investigate violations of criminal laws. It can be inferred that the Legislature also knew that there were no indictments by grand juries, or informations filed by district attorneys of such "allegations and accusations" of the violation of criminal laws in this particular labor-management field, despite the existence of "unprecedented conditions" resulting in a shut-down of construction. Thus, there is a clear inference from the preamble that the Legislature believed that there was a weighty public interest in criminal law enforcement in the labor-management field in Louisiana. Some inference that could be indulged in as to the "allegations and accusations of violations" of criminal laws, which would be reasons for the failure of some of the public officials charged with enforcing the law to perform their duty and thus to make necessary an investigative agency over and above the Sheriffs and State Police, might be, viz:

(a) That a sheriff, claiming to act as the business agent for a labor union, used his position as sheriff to intimidate persons connected with construction projects in his parish; and that such sheriff knew, consented to, and participated in, subjecting individuals connected with construction work in his parish to a system of intimidation, harrassment, favoritism and corruption.

(b) That there were state police in high ranks engaged in shakedowns and public bribery in connection with construction work in the State.

(c) That there were a business agent of a labor union and a head of a material supply concern, who conspired, and through extortion, induced by the wrongful use of fear, through threatened strikes and work stoppages by members of the labor union of the agent, required those building the petro-chemical plants to purchase materials from such material supply concern, in such construction work at prices higher than prices therefor otherwise obtainable in the market.

The statute also specifically set forth another reason for its need, that is, that the district attorneys, grand juries and other law enforcement agencies were limited in their jurisdiction to parish lines, and that additional investigative facilities were needed on a statewide basis, viz:

> "xxx in order to supplement and assist the efforts and activities of the several district attorneys, grand juries and other law enforcement officials and agencies of the State of Louisiana and of the U.S., it is imperative that additional investigative facilities on a state-wide basis be made available;"

The membership of the Labor-Management Commission of Inquiry consisted of three representatives of labor, three representatives of management and three representatives of the public. The labor members,

at the time the petition was filed, as well as at present, consist of the State Vice-President of the AFL-CIO, the State Secretary-Treasurer of the AFL-CIO, and a Jesuit Priest who was a member of the faculty of Loyola University of New Orleans. The management members then and now consist of the manager of one of the world's largest oil refineries; the head of a large construction company, and the head of another large business. The public members, at the time the petition was filed, consisted of the Dean of the Law School of Tulane University, who was Chairman, the Dean of the Law School at Louisiana State University, as Vice-Chairman, and the President of a large bank in Southwest Louisiana. The Dean of the Tulane Law School has now been replaced by the President of Louisiana Polytech College. The Dean of L.S.U. has resigned.

There could hardly be a problem confronting a community with more of a "weighty public interest" than the problem facing Louisiana at the time this Statute was enacted to investigate the problem.

As was stated in Hannah, the rules of procedure for the type of proceeding which adjudicates, if made mandatory for an investigation proceeding, would

> "xxx make a shambles of the investigation and stifle the agency in its gathering of facts."

The recognized rights of witnesses in an investigation proceeding, which did not adjudicate, were fully granted: The statute provided for representation by counsel for a witness; and full protection of a witness from self-incrimination. Though the statute did deny

the right of a witness to cross-examine other witnesses, nevertheless such witness could submit questions which the Commission would ask if it deemed them appropriate to its inquiry. The statute limited the right of any person claiming to be defamed to present witnesses, by requiring him to submit a list of witnesses he may wish to have subpoenaed, with the issuance of subpoenaes for such witnesses to be in the discretion of the commission. There were other controls to protect a person from being defamed. The rights of a person subpoenaed were protected up to the point where such person would not be permitted to make a shambles of the investigation. The Commission could not adjudicate, and its findings were to be a report, such as made by any other purely investigative body.

The fact that there would be collateral consequences from the Commission making investigations and reports would not affect the legitimacy of the Commission's investigative function. We quote from Hannah, viz:

> "xxx the respondents contend, and the court below implied, that such procedures are required since the Commission's proceedings might irreparably harm those being investigated by subjecting them to public opprobrium and scorn, the distinct likelihood of losing their jobs, and the possibility of criminal prosecutions. That any of these consequences will result is purely conjectural. There is nothing in the record to indicate that such will be the case or that past Commission hearings have had any harmful effects upon witnesses appearing before the Commission. However, even if

such collateral consequences were to flow from the Commission's investigations, they would not be the result of any affirmative determinations made by the Commission, and they would not affect the legitimacy of the Commission's investigative function."

xxx

"Cf Sinclair v. United States, 279 US 263, 295, 73 L ed 692, 698, 49 S. Ct. 268, holding that Congress' legitimate right to investigate is not affected by the fact that information disclosed at the investigation may also be used in a subsequent criminal prosecution. Cf. also McGrain v. Daugherty, 273 US 135, 179, 180, 71 L ed 580, 595, 47 S. Ct 319, 50 ALR 1, holding that a regular congressional investigation is not rendered invalid merely because 'it might possibly disclose crime or wrongdoing' on the part of witnesses summoned to appear at the investigation. Id 273 US at 180."

But, the petitioner claims that the Commission is "nothing but a trial agency." And the heavy argument of petitioner is that a report of the Commission might conclude that there was "probable cause to believe" that a named person had violated a criminal law. We quote the provision requiring a report, viz:

"the Commission shall make and publicize its findings with respect to the question whether or not there is probable cause to believe that there are or have been violations of any criminal law xxx. The Commission shall have no authority to and it shall make no binding adjudication with respect to such violation or violations; however, it may, in its discretion, include in its findings the

conclusions of the commission as to specific individuals or as to the general situation, or as to both, xxx."

There is no substantial difference between the report required of this Commission from the report made by any other investigating body, where the report of its findings do not adjudicate and are made public. The report of this Commission, as required by the above quoted portion of the statute, in substance is no more than the report required in the Civil Rights Commission statute (42 USCA 1975c), the constitutionality of which was sustained in Hannah, viz:

(Civil Rights)
"The Commission shall submit interim reports to the President and to the Congress xxx."

The Civil Rights Commission, amongst other duties, was directed to

"(5) investigate allegations, xxx, that citizens of the United States are unlawfully being accorded or denied the right to vote xxx, as a result of any patterns or practice of fraud or discrimination in the conduct of such election;"
(42 USCA 1975c(5)).

To "unlawfully" accord or deny a citizen the right to vote is a crime, and the Civil Rights Commission was to investigate relative to according or denying a citizen the right to vote, which, of course, was to investigate crimes. Here, the Labor-Management Commission was authorized to investigate to see if there were any vio-

lations of criminal statutes relative to labor-management relations.

The Civil Rights Commission under the broad requirement of the statute to submit a report, was just as authorized as the Labor-Management Commission to include in its report "findings with respect to the question whether or not there is probable cause to believe that there are or have been violations of any criminal law" in the area of voting as the Labor-Management Commission was in the area of labor-management. The Civil Rights Commission could not make a binding adjudication, and neither can the Labor-Management Commission. The Civil Rights Commission, under the statute creating it, had just as much right as the Labor-Management Commission had to include in its findings "the conclusions of the commission as to specific individuals or as to the general situation, or as to both, xxx", for the Civil Rights Commission was also authorized to make "findings", (42 USCA 1975c (b)).

To "publicize" the report as required by this statute is in substance no more than the requirement in the Civil Rights Commission statute that such Commission "submit interim reports". To publicize a report is to make it *openly*, as distinguished from confidential. There is nothing in the Civil Rights Commission Statute which provides that its reports shall be confidential. The filing of such reports with the President and Congress would certainly publicize such reports.

The statute creating the Civil Rights Commission

contemplated that its hearings were to be public (42 USCA 1975a (e) and (g)) just as the Labor-Management Commission statute. These public hearings are in respect of "this nations historic distrust of secret proceedings." Re Oliver, 333 U.S. 257 (273), 92 L. Ed. 682 (694), 68 S. Ct. 499.

There can be no complaint as to secrecy of the proceedings or as to right of counsel, as both are commanded here, and the dissent in Re Groban, would not apply to this statute.

For the foregoing reasons, it is respectfully submitted that the petition for rehearing should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Ashton L. Stewart, Special Assistant Attorney General of the State of Louisiana, attorney for appellees herein and a member of the bar of the Supreme Court of the United States, hereby certify that on the ..... day of July, 1969, I served a copy of the foregoing Reply to Petition for Rehearing on the appellant herein by mailing said copy in a duly addressed envelope with first class postage prepaid to his attorney of record, J. Minos Simon, Esquire, 1408 Pinhook Road, P. O. Box 52116, OCS, Lafayette, Louisiana 70501.

Baton Rouge, Louisiana, this ..... day of July, 1969.

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B-2019, 7-69